

EMPLOYER STATUS DETERMINATION

The Oxford Group, Inc.

This is the determination of the Railroad Retirement Board concerning the status of The Oxford Group, Inc. (Oxford) as an employer under the Railroad Retirement Act (45 U.S.C. §231 et seq.) (RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. §351 et seq.) (RUIA).

Information about Oxford was furnished by its Chief Financial Officer, John W. Miller. Oxford is engaged in the acquisition, rehabilitation, leasing, and sale of locomotives. Oxford was incorporated on April 15, 1988 and began conducting operations shortly thereafter.

Oxford is a privately held company. Its directors are Roland McPherson, Jack V. Jolley, Thomas W. Rissman, and James Knox. Mr. McPherson and Mr. Rissman are directors of Wisconsin Central Transportation Corporation (WCTC), a holding company which is not a covered employer under the Acts; however, they are not officers of WCTC's railroad subsidiary, Wisconsin Central Ltd. (BA No. 2633). Mr. McPherson, Mr. Rissman, and Mr. Knox collectively own approximately 400,745 shares of WCTC, which is approximately a 5 percent interest.

Oxford originally had long-term locomotive leases with the Union Pacific (BA No.1715). Since the original leasing activity with the Union Pacific, Oxford has leased locomotives to the following railroads: Dakota, Minnesota and Eastern (BA No.2632); Gateway Western (BA No.3771); Southern Pacific (BA No.1713); and Wisconsin Central Ltd. Oxford has made leases concurrently with more than one railroad. Oxford has sold locomotives to First National Bank of Maryland, Helm Financial Group, Inc., and Wisconsin Central Ltd. Oxford has also sold various locomotive parts to a number of parties. The majority of Oxford's sales activity has been to financial or leasing institutions.

Mr. Miller stated that all of Oxford's leasing activity is with railroad companies. He described in detail Oxford's leasing business with Wisconsin Central Ltd. (WCL). In July 1988, WCL entered into an agreement with Oxford whereby WCL agreed to provide certain services and materials with respect to the control, possession and rehabilitation of locomotives purchased by Oxford. WCL billed Oxford \$137,000, \$22,000, and \$544,000 for services and materials provided in 1991, 1990 and 1989, respectively. In 1991, WCL purchased \$63,000 of locomotive parts and \$47,000 of locomotive diesel fuel from Oxford. No such purchases were made in 1989 and 1990. During 1990 and 1989, WCL

periodically leased locomotives from Oxford on a short term basis. WCL paid approximately \$226,000 and \$493,000 under those short term leases during 1990 and 1989, respectively. WCL did not lease any locomotives from Oxford in 1991. Mr. Miller stated that the remainder of Oxford's leasing is with other railroads.

In a letter dated October 16, 1995, the attorney for Oxford, Mr. Robert H. Wheeler, submitted additional information about the leasing activities of Oxford with its affiliate WCL. That information showed that Oxford leased 40% of its locomotive fleet to WCL in 1989 and 1990. Thereafter through 1994 Oxford leased no locomotives to WCL. In 1989 20.9% of Oxford's revenue was derived from WCL. This percentage dropped to 6.4% in 1990, 6.8% in 1991, .009% in 1992 and no revenues from WCL through 1994.

Mr. Miller stated that Oxford has one employee. This employee does not perform services on property owned by a railroad, but rather works in an office building located at 6 West Hubbard Street in Chicago. His work is not directed, supervised, or inspected by any employee of any railroad.

Additional information about Oxford was provided by Daniel A. Josh, Jr., Assistant Vice President - Controller of WCL. According to Mr. Josh, a number of officers and directors of WCL own shares of Oxford's outstanding common stock. More specifically, Edward A. Burkhardt, who is President, Chief Executive Officer and a director of WCL, owns 19 percent of Oxford's stock. According to Moody's Transportation Manual 1992, Mr. Burkhardt is also President, Chief Executive Officer and a director of WCTC. Robert H. Wheeler, who is General Counsel and a director of both WCL and WCTC, owns 2 percent of Oxford's stock. Thomas F. Power, Jr., who is Executive Vice President, Chief Financial Officer, and a director of WCL and WCTC, owns 7 percent of Oxford's stock. Mr. Rissman, who is Secretary of WCL, which Mr. Josh stated, is a non-executive office, owns 4 percent of Oxford's stock. As indicated above, Mr. Rissman is also a director of Oxford and WCTC. Mr. McPherson, who as indicated above serves as a director of both WCTC and of Oxford, owns 19 percent of Oxford's stock and is also a director of WCL.¹

Section 1(a)(1) of the RRA defines the term "employer" to

¹Mr. Josh also stated in his letter of October 15, 1991 that Donald J. McLachlan, who was WCL's Chairman of the Board, owned 19 percent of Oxford's outstanding stock. Mr. McLachlan was listed in Moody's Transportation Manual for 1991 as a director of WCTC, but does not appear in Moody's Transportation Manual for 1992 in the list of WCTC directors.

include:

carrier by railroad subject to the jurisdiction of the Surface Transportation Board under Part A of subtitle IV of title 49, United States Code;

(ii) any company which is directly or indirectly owned or controlled by, or under common control with, one or more employers as defined in paragraph (i) of this subdivision, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad.

Section 1 of the RUIA contains essentially the same definition.

Section 202.5 of the Board's regulations (20 CFR §202.5) defines a company under common control with a carrier as one controlled by the same person or persons which control a rail carrier. The absence of actual exercise of that control does not determine whether common control as provided in section 1(a)(1)(ii) of the RRA exists; the right or power to exercise control is sufficient.

See 20 CFR §202.4.

Oxford is not a carrier by railroad. With reference to the second part of the statutory definition of employer quoted above, it is noteworthy that two of Oxford's directors (Mr. Rissman and Mr. McPherson) are also directors of WCTC. Although WCTC is not itself a covered employer under the Acts, it is the parent company of WCL, which is a covered rail carrier employer. According to Moody's Transportation Manual 1992, WCTC has seven directors. In addition to Mr. McPherson and Mr. Rissman, Moody's lists the following individuals as directors of WCTC: E.A. Burkhardt, R.K. Lubin, T.F. Power, Jr., R.H. Wheeler, and C. Ferenbach.

Mr. McPherson and Mr. Rissman do not constitute a controlling interest on either the Board of Directors of Oxford, where they are 50 percent of the Board, or of WCTC, where they are only 2 of 7 directors. In addition, although Mr. McPherson, Mr. Rissman, and Mr. Knox collectively own 400,745 shares of WCTC, those shares represent only approximately a 5 percent interest in WCTC.

None of the directors of Oxford are employees of any railroad.

However, the information provided by Mr. Josh indicates that 52

percent of Oxford's outstanding stock is owned by individuals who serve as directors and/or officers of WCL, as indicated below:

<u>Individual</u> <u>Stock</u>	<u>WCL Position</u>	<u>Oxford</u>
Edward A. Burkhardt	WCL President, CEO, & Director	19%
Robert H. Wheeler	General Counsel, Director	2%
Thomas F. Power, Jr.	Executive Vice President, Chief Financial Officer, & Director	7%
Thomas W. Rissman	Secretary	4%
Robert F. Nadrowski	Vice President Mechanical	1%
Roland McPherson	Director	<u>19%</u>
TOTAL % OXFORD STOCK OWNED BY WCL DIRECTORS & OFFICERS		52%

It should also be noted that when Donald J. McLachlan was a director of WCL (as recently as October 15, 1991 when Mr. Josh wrote his letter), 71 percent of Oxford's outstanding common stock was owned by directors and/or officers of WCL.

It is evident from the information summarized above that the management of Oxford and WCL are interlocked through common directors, officers, and stock ownership. The information provided by Mr. Josh demonstrates that directors and officers of a covered rail carrier employer, WCL, have the right to control Oxford through their ownership of a majority of Oxford's outstanding common stock. Since that right to control exists, it is determined that Oxford is under common control with a rail carrier employer.

The question then becomes whether Oxford provides service in connection with railroad transportation. Oxford's business consists of acquiring, rebuilding, selling and leasing locomotives.

Section 1(a)(1)(ii) of the Railroad Retirement Act excludes from the definition of coverage a company that performs a service in connection with rail transportation if that service is casual service. The Board has defined casual service as service which is "so irregular or infrequent as to afford no substantial basis for an inference that such service or operation will be repeated." 20 CFR 202.6. Although Oxford did a significant amount of business with its affiliated railroad in both 1989 and

1990, it has done no business with this affiliate in subsequent years. In the judgment of the majority of the Board, this pattern of business falls squarely within section 202.6 of the regulation in that there is no basis for inferring that services for the rail affiliate will be performed in the future.

Accordingly, it is the determination of the majority of the Board that Oxford Group, Inc. is not an employer covered under the Railroad Retirement and Railroad Unemployment Insurance Acts.

Glen L. Bower

V. M. Speakman, Jr.
opinion

(Dissenting
attached)

Jerome F. Kever

